Filed 5/5/16 In re Isaac C. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ISAAC C., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ANTONIO P., Defendant and Appellant.	D068803 (Super. Ct. No. SJ12618E)

APPEAL from an order of the Superior Court of San Diego County, Sharon L. Kalemkiarian, Judge. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Paula J. Roach, Deputy County Counsel, for Plaintiff and Respondent.

Dependency Legal Group of San Diego and Beth Ploesch for Minor.

In this juvenile dependency appeal, Antonio P., the biological father of minor Isaac C., seeks a reversal of the order terminating his parental rights and implementing a plan of adoption for Isaac. In part as a result of inaccurate information from the mother, the San Diego County Health and Human Services (Agency) was unable to identify or give Antonio notice of the proceedings — as an alleged father — until well after the adjudication and disposition hearing at which the court had denied reunification services for the mother. By the time Antonio appeared, the selection and implementation hearing had been on calendar for six months, and the juvenile court ultimately continued that hearing for another two months to determine whether Antonio (or either of two other alleged fathers) was Isaac's biological father. After the court entered a judgment of paternity as to Antonio, the court proceeded with the selection and implantation hearing that resulted in the order on appeal.

Antonio seeks a reversal of the order terminating his parental rights, presenting two specific arguments: (1) because the Agency had not conducted a reasonably diligent search for him, the court erred in bypassing reunification services for him at the disposition hearing; and (2) because his whereabouts became known to the court within six months of the disposition hearing and the Agency failed to provide, or validly bypass, reunification services, the court erred in terminating Antonio's parental rights. Neither argument has merit. Accordingly, we affirm the order.

I.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In addition to Isaac (the dependent child), Antonio (Isaac's biological father) and the Agency, the other participants in the juvenile court proceedings — none of whom is a party to the appeal — included: Crystal F., Isaac's mother; and Isaac C. II (Isaac, Sr.), Paul D. and Curtis M., each an alleged father of Isaac at various times in the proceedings.

A. *Detention Hearing (Sept. 8, 2014)*

In March 2014, Crystal gave birth to Isaac. In September 2014, the Agency filed a petition on behalf of Isaac, alleging a failure to protect.[2] The Agency alleged that Crystal's drug use rendered her unable to protect or care for Isaac and that Isaac's alleged father, Isaac, Sr., who was incarcerated due to drug sales, had failed to protect and supervise Isaac.

At the detention hearing in September 2014, the court found good cause to (and did) detain Isaac, appointed counsel for alleged father Isaac, Sr., and set a jurisdiction and disposition hearing approximately one month later.

---

1 "In accord with the usual rules on appeal, we state the facts in the manner most favorable to the dependency court's order." (*In re Janee W.* (2006) 140 Cal.App.4th 1444, 1448, fn. 1 (*Janee W.*).)

2 The Agency filed the petition pursuant to what was then Welfare and Institutions Code section 300, subdivision (b). (All further undesignated statutory references are to this code.) That statute has since been amended, and former subdivision (b) is now found in subdivision (b)(1) of section 300. (Stats. 2014, ch. 29, § 64.)

B. *Jurisdiction and Disposition Hearing (Oct. 8, 2014)*

The Agency submitted a report prior to the jurisdiction and disposition hearing. According to the report, both Crystal and Isaac, Sr., believed that Isaac, Sr., was Isaac's biological father. The Agency further reported that Crystal had an extensive substance abuse history; that she had not complied with a voluntary contract in May 2014 after Isaac's birth; that her parental rights to four older children had been terminated and the children placed for adoption; that Crystal failed to make herself available to discuss her current needs; and that Isaac, Sr., was serving a four-year sentence for drug sales. The Agency requested that no reunification services be provided to Crystal and that the section 366.26 selection and implementation hearing be set within 120 days.

Based on the foregoing, in early October 2014 the court ordered genetic testing for Isaac, Sr., (as an alleged father) and voluntary services for Crystal and for Isaac, Sr. The court set a settlement conference for November 20, 2014, and a contested adjudication and disposition hearing for December 5, 2014.

C. *Settlement Conference (Nov. 20, 2014)*

The results of the genetic testing established that Isaac, Sr., was not the biological father of Isaac, and at a settlement conference in November 2014 the court interlineated the petition accordingly and filed a judgment of nonpaternity.

The court then explained to Crystal the importance of properly identifying Isaac's biological father and asked her a number of questions under oath. Crystal identified "Anthony . . . I do not know his last name" (Anthony) as the potential biological father of

Isaac.[3] Crystal testified that Anthony was a 32-year-old Filipino whose nickname was "Gizmo" and who, prior to October 2013, worked at the 7-Eleven store at Fifth Avenue and C Street in downtown San Diego. Crystal understood that he lived with his aunt in the Palm Avenue area of Chula Vista. Significantly, shortly after Crystal found out she was pregnant, in June 2013 — which was the last time she spoke with him — Crystal told Anthony that she was pregnant and that the child was possibly his. Anthony had no reaction, other than asking Crystal "to let him know."[4] According to Crystal, in or around September 2013, Anthony went to prison and was still in custody at the time of her testimony in November 2014. Crystal learned this information from an employee of the 7-Eleven store who Crystal believed still worked there. Finally, Crystal told the court that she might have paperwork at home that contained Anthony's last name and address; and in response to the court's inquiry, Crystal said that she would go through her paperwork and let the social worker know what information she found.

The court amended the petition to reflect "Anthony, last name unknown" as the alleged father, confirmed the December 5, 2014 date for the contested adjudication and disposition hearing, and ordered the Agency to conduct a reasonable search to locate and notify Anthony of the juvenile court proceedings.

---

3 Anthony and Antonio are the same person, but at this stage of the proceedings, the only name known was "Anthony."

4 In her later-filed Parentage Inquiry (Mother's Questionnaire and Offer of Proof), Crystal testified that she told Anthony he was the father and Anthony said he wanted a paternity test.

D. *Contested Adjudication and Disposition Hearing (Dec. 5, 2014)*

By the time of the contested adjudication and disposition hearing in early December 2014, Crystal had identified another potential biological father, Paul, and the Agency had contacted him and advised him of the proceedings.

At the hearing, the court amended the petition to provide that the father is unknown, sustained the allegations in the petition, found jurisdiction, declared Isaac to be a dependent of the court, removed Isaac from Crystal's custody and continued Isaac's placement in foster care. The court declined to order reunification services for Crystal, citing section 361.5, subdivision (b)(10), (11) & (13).[5] Finally, the court set a date of April 1, 2015, for the section 366.26 hearing to implement a permanent plan for Isaac.

---

[5] Reunification services need not be provided to a parent when the court finds, by clear and convincing evidence: "(10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian . . ."; "(11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent . . ."; or "(13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention . . . ." (§ 361.5, subd. (b).)

E. *Section 366.26 Selection and Implementation Hearing (Apr. 1, 2015; Jun. 2, 2015; Jul 10, 2015; Jul. 14, 2015; Aug. 28, 2015)*

By the time of the initially-noticed section 366.26 hearing in April 2015, Crystal had identified three alleged (i.e., potential biological) fathers — Anthony, Paul and Curtis. In late January 2015, the Agency followed up with Paul, giving him notice of the section 366.26 hearing. On February 10, 2015, Crystal confirmed to the social worker that Anthony was a potential biological father, but did not provide any additional information about him. The next day, the Agency filed a declaration of due diligence regarding its attempt to locate Anthony (§ 294, subd. (g)), advising the court that, as a result of a lack of information — in particular, a full name, date of birth or social security number — the Agency was "unable to determine the identity of Isaac's father." In response, the juvenile court ordered (§ 294, subd. (g)(1)) that the Agency "dispense[]" with notice of the proceedings (including by publication) to "Anthony Doe (unidentified father)" until the Agency learns his identity and residence. The following day, in addition to Anthony and Paul, Crystal identified another alleged father, Curtis.

In its section 366.26 hearing report, the Agency recommended that the court terminate Crystal's parental rights and the potential parental rights of all three alleged fathers and order a permanent plan of adoption for Isaac. The court-appointed special advocate (CASA) for Isaac also filed a section 366.26 hearing report which also recommended that Crystal's parental rights be terminated and a permanent plan of adoption for Isaac be ordered.

At the April 1, 2015 hearing, the Agency requested a 45- to 60-day continuance to attempt to provide notice of the proceedings, as follows: (1) to the newest alleged father, Curtis; and (2) to Anthony, despite the order dispensing with notice of the proceedings, on the basis that Crystal had just provided Anthony's last name ("Plakas")[6] and residence ("in prison . . . [somewhere] in the State of California"). Given the timing of the new information related to potential parentage and its effect/prejudice on Anthony, Paul, Curtis and Isaac, the juvenile court continued the section 366.26 hearing until June 2, 2015. The court also amended the petition to change the name of alleged father " 'Anthony Unknown' " to " 'Anthony Plakas' " and to add the names of Paul and Curtis as alleged fathers. Finally, the court ordered the Agency to conduct further search efforts to locate and provide notice to Anthony.

In preparation for the June 2, 2015 hearing, the Agency located and provided notice to Anthony.[7] By the time of the hearing, Anthony had been released from prison, and he appeared voluntarily. At and after the hearing Anthony properly identified himself as "Antonio P[.]" (Antonio). The court amended the petition to properly and fully identify Antonio as an alleged father, appointed counsel for Antonio, ordered

---

6 In fact, this was not Anthony's last name. (See fn. 7, *post*.)

7 Additional search efforts in early April were fruitless; after further questioning by the social worker, in mid-April Crystal provided a possible date of birth and a specific prison for Anthony; although the social worker was unable to find "Anthony Plakas," she did locate an "Anthony P[.]" at the identified prison; when advised of this person, Crystal said that the full correct name was "Anthony P[.] P[.]"; and the Agency effected service on Anthony at the prison facility in late April, notifying him of the June 2, 2015 date for the section 366.26 hearing.

genetic testing to take place at 2:30 p.m. on June 9, 2015, set a status conference for July 1 (by which time the court hoped to have the results of the genetic testing) and continued the section 366.26 hearing until July 10. The court also provided Antonio with an explanation of how far, procedurally, the juvenile court proceedings had advanced — i.e., the court had taken jurisdiction, reunification services were no longer available, and the court was now in the process of deciding on a permanent plan for Isaac.

At the July 1, 2015 status conference, counsel informed the court that there had been no genetic testing, because Antonio did not show up for the court-ordered testing on June 9; on June 6, Antonio had been arrested and was incarcerated at the time of the scheduled testing. With Antonio's consent, the court ordered that Antonio's genetic testing proceed in the courtroom. The court confirmed the July 10 continued section 366.26 hearing.

On July 10 and 14, 2015, the court again continued the section 366.26 hearing to obtain the results of Antonio's genetic testing and to produce (and arraign, appoint counsel for and to do genetic testing on) Curtis, who by then had been located in local custody. At the July 14 hearing, the court again explained that, despite the late entry to the proceedings by Antonio and Curtis, procedurally "we're at the point in our process where I'm going to make a decision whether [Isaac]'s going to be adopted or placed in a guardianship or be in foster care, that's where we are. That's not changing. Isaac has that right." The court continued the section 366.26 hearing to August 28, 2015, with any motions to be filed by August 24, 2015.

Prior to the continued section 366.26 hearing, there were two special hearings in early August. Based on the results of the genetic testing, the court entered a judgment of paternity as to Antonio and judgments of nonpaternity as to Paul and Curtis.

The section 366.26 hearing proceeded on August 28, 2015.[8] The court accepted into evidence numerous written reports and addenda from the Agency and Isaac's CASA, and counsel for the Agency, Crystal, Antonio and Isaac presented closing argument. The Agency and Isaac emphasized the procedural status of the case — namely, that the focus of the section 366.26 hearing was on the selection of a permanent stable home for Isaac based on his best interest, and the uncontradicted evidence supported termination of parental rights and adoption. Isaac also pointed out that neither parent had filed a section 388 petition.[9] Crystal requested that the court not terminate her parental rights, arguing that the Agency had not met its burden of proof. Antonio attacked the Agency's and Isaac's position on three grounds: (1) the evidence supporting Isaac's adoptability was "in fluctuation" and otherwise insubstantial; (2) the parent-child bond between Antonio and Isaac was "significant enough" to overcome section 366.26, subdivision (c)(1)'s presumption in favor of termination of parental rights and adoption;

---

8 Between June 2 (Antonio's first appearance) and August 28 (the § 366.26 hearing), 2015, Antonio appeared in juvenile court with counsel on six separate occasions, and counsel appeared without Antonio on one additional occasion.

9 Even after the reunification period has passed, "the parent has the continuing right to petition the court for a modification of any of its orders based upon changed circumstances or new evidence pursuant to section 388." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-309 (*Marilyn H.*); accord, *id.* at pp. 299, 305, 309.)

and (3) alternatively, even if the parent-child bond were not strong enough to overcome the statutory presumption, the court nonetheless should order a guardianship or foster care for Isaac until Antonio can provide for Isaac, which ultimately would benefit Isaac by allowing him the opportunity to have a relationship with his biological father.[10] In rebuttal, the Agency stressed the need to consider Isaac's best interest, arguing specifically that the beneficial parent-child relationship exception did not apply because there had been no visitation or contact — and, thus, no relationship whatsoever — between Antonio and Isaac.

Following argument, the court found that Isaac was likely to be adopted within a reasonable time and that no statutory exception to termination of parental rights applied.[11] Accordingly, the juvenile court terminated Crystal's and Antonio's parental

---

10 Antonio emphasized his late entry into Isaac's life and the affirmative actions that he had taken since then to demonstrate his feelings for Isaac, his desire to raise Isaac and his dedication to provide Isaac the best possible home. Antonio principally relied on a thoughtful letter he wrote to Isaac (delivered to Isaac's social worker a week before the section 366.26 hearing) in which Antonio introduced himself and explained how much he cared about Isaac. Additionally, Antonio had written a similar letter to the Agency a month earlier (after genetic confirmation of paternity), stating that he did not want to give up his parental rights, that he wanted the foster parents to remain in place, and that once he was released from prison (in June 2016) he wanted custody of Isaac. Finally, Antonio had completed a six-hour parenting class.

11 As relevant to a principal issue on appeal, in response to Antonio's argument that he should be given reunification services and the opportunity to develop a parent-child relationship with Isaac, the juvenile court noted for the record: "[Antonio's attorney], I know, has counseled his client on this. *In order for* [*Antonio*] *to have made a request for reunification services, he would have had to file a 388, which has not happened*." (Italics added.)

rights, referred Isaac to the Agency for adoptive placement and designated Isaac's current caregivers as his prospective adoptive parents.

Antonio timely appealed from the written order following the section 366.26 hearing.

II.

DISCUSSION[12]

Antonio seeks a reversal based on two specific arguments: (1) given what Antonio characterizes as the Agency's lack of effort to locate him, the juvenile court erred in bypassing services for Antonio at the adjudication and disposition hearing in December 2014; and (2) the juvenile court erred in terminating Antonio's parental rights once his whereabouts became known to the Agency within six months of bypassing services. Neither argument provides a basis on which to grant relief.

A. *Antonio Did Not Establish Reversible Error in the Trial Court's Failure to Have Ordered Reunification Services for Antonio at the Disposition Hearing in December 2014*

Antonio argues that the juvenile court lacked the authority to bypass reunification services for him at the disposition hearing, because at that time the court had not yet made — nor was there substantial evidence to support — a finding that the Agency had

12 Isaac joins in the Agency's arguments on appeal. (Cal. Rules of Court, rule 8.200(a)(5).)

conducted a reasonably diligent search for him.[13] "Section 361.5 and its various subdivisions govern the provision of reunification services." (*In re Jonathan P.* (2014) 226 Cal.App.4th 1240, 1257.)

Only after the juvenile court entered a judgment of nonpaternity as to Isaac, Sr., on November 20, 2014, did Crystal first identify "Anthony . . . I do not know his last name" as an alleged (biological) father of Isaac. Two weeks later at the disposition hearing on December 5, 2014, among other rulings, the juvenile court amended the petition to provide that *the father is unknown* and declined to order reunification services *for Crystal*. From this record, Antonio infers that the court also denied reunification services to him based on section 361.5, subdivision (b)(1), which allows the court to bypass services to a parent where the court is presented with proof that " 'a reasonably diligent search has failed to locate the parent' " and finds by clear and convincing evidence that "the whereabouts of the parent . . . is unknown." From this inference, Antonio argues that the court erred, because the court had neither made such a finding nor been presented with evidence that could support such a finding.

One problem with Antonio's argument is the fallacy in his inferred premise — namely, that the juvenile court denied him services under section 361.5, subdivision (b)(1) based on his unknown "whereabouts." In fact, the court did not consider reunification services for Anthony because his *identity* — not just his

---

13 A child welfare agency acts with "[r]easonable diligence" in locating a missing parent if the agency conducts "a thorough, systematic investigation . . . in good faith." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188 (*Justice P.*).)

whereabouts — was unknown. Accordingly, section 361.5, subdivision (b)(1)'s requirements for evidence and findings related to the diligence of a search for a parent whose "*whereabouts*" are unknown is simply inapplicable here.[14]

A second problem with Antonio's argument is that reunification services under section 361.5 are available only "to the child and the child's mother and *statutorily presumed father*." (§ 361.5, subd. (a), italics added.) As our Supreme Court has stated, "only a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451 (*Zacharia D.*); see *id.* at p. 453 ["if a man fails to achieve presumed father status prior to the expiration of any reunification period in a dependency case, . . . he is not entitled to such services under section 361.5"].) Thus, as an alleged father who first appeared *after* reunification services had been terminated, Antonio was not entitled to services. (See *Marilyn H., supra,* 5 Cal.4th at pp. 304 ["Once the reunification services had been terminated, the focus of the case shifted away from reunification to providing a permanent, stable placement for the children."], 307 [same] 309 [same].) Anticipating this problem, Antonio suggests that section 316.2, subdivision (b) entitled him to notice

---

14 Much of Antonio's opening brief is directed to the Agency's alleged failure to have conducted a reasonably diligent search for him. Because we decide the ultimate issue of Antonio's entitlement to reunification services based on statutory language, *ante*, and forfeiture, *post*, we do not reach the issue of the reasonableness of the Agency's diligence. By our silence, the parties are not to infer our acceptance of, or agreement with, Antonio's characterization of the Agency's purported lack of reasonable diligence in identifying or locating him.

of the proceedings and opportunity to elevate his status to a presumed father, and the Agency's failure to provide such notice amounted to a denial of due process.[15]

Due process entitles a parent to receive "notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object." (*Justice P.*, *supra*, 123 Cal.App.4th at p. 188.) Before depriving a father of his parental interest in his child, he must be accorded "adequate notice and an opportunity to be heard." (*In re B. G.* (1974) 11 Cal.3d 679, 689.) However, where (as here) a father claims that the lack of notice of the proceedings caused him to fail to achieve presumed father status prior to expiration of the reunification period, "[h]is only remedy . . . was to file a motion to modify under section 388." (*Zacharia D.*, *supra*, 6 Cal.4th at p. 453; accord, *Justice P.*, at p. 189 [§ 388 motion "proper vehicle to raise a due process challenge based on lack of notice"]; *In re P.A.* (2007) 155 Cal.App.4th 1197, 1209 [same]; *In re Marcos G.* (2010) 182 Cal.App.4th 369, 380, fn. 8 ["a challenge to a dependency judgment on lack of due process/notice grounds is properly made by means of a section 388 petition"].) In facing this specific issue, our Supreme Court has ruled: "Requiring the parent to petition the court to hear a challenge to a custody order after reunification services have been terminated does not violate substantive due process." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 307.)

---

15 "If, after the court inquiry, one or more men are identified as an alleged father, each alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. . . ." (§ 316.2, subd. (b).)

In relevant part, section 388 provides that a parent like Antonio may petition the juvenile court "to change, modify, or set aside any order of court previously made" based on a "change of circumstance or new evidence." (§ 388, subd. (a)(1).) The petition must allege why the requested change is "in the best interest of the dependent child." (§ 388, subd. (b).) As applicable here, once reunification services are terminated, "[t]he burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) Both substantive and procedural due process are satisfied when sections 366.26 and 388 are construed together, given the overall legislative scheme that balances a parent's opportunity to reunify with the child against the child's need for a stable permanent home. (*Marilyn H.*, at p. 309.) Even after the focus shifts from reunification to selection and implementation of a plan, the application of sections 366.26 and 388 together allows the juvenile court both to protect the child's need for prompt resolution of custody and to address a legitimate change of circumstances related to reunification. (*Marilyn H.*, at p. 309.) Thus, in section 388, "the Legislature has provided the parent an adequate opportunity to show current evidence of changed circumstances and has given the court the chance to consider it prior to the section 366.26 hearing without unnecessarily disrupting the focus and efforts of the court to establish permanency for the child." (*Marilyn H.*, at p. 310.)

As we explain, however, by failing to file a section 388 petition, Antonio failed to preserve for appeal the issue whether a lack of due process prejudicially affected his right to reunification services; i.e., Antonio forfeited appellate review of the issue.[16]

An appellate court ordinarily will not consider a challenge to a ruling if the aggrieved party could have, but did not, timely object in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*) [mother's challenge to visitation order from § 366.26 hearing].) The purpose of such a rule is to encourage parties to raise the purported error at a time it could, if possible, be corrected. (*Ibid.*; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185, fn. 1 [" 'it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected' " had it been brought to their attention in the trial court].) This rule applies in juvenile dependency proceedings. (*S.B.*, at p. 1293.) In *In re Janee J.* (1999) 74 Cal.App.4th 198, for example, the mother claimed that, because she did not receive the statutorily required formal notice that her parental rights could be terminated after six months if she failed to participate and cooperate, her due process rights were adversely affected. (*Id.* at pp. 209-210.) By failing to raise this due process objection in the trial court, however, the mother forfeited appellate review of the issue. (*Id.* at p. 210; see generally *In re Levi U.* (2000)

---

16 Section 366.26, subdivision (*l*)(2) provides that a party's failure to petition for writ review as to issues from the disposition hearing "shall preclude subsequent review by appeal." We agree with Antonio that his failure to file a statutory writ petition following the December 5, 2014 disposition hearing did not result in a such a forfeiture. Because "Anthony, last name unknown" had not yet been identified, let alone located, at the time of the disposition hearing, the statutory writ process *for parties to the disposition conference* was not implicated. (See § 366.26, subd. (*l*)(3)(A).)

78 Cal.App.4th 191, 201 [by failing to object to a denial of due process in precluding reunification services, mother forfeited argument on appeal]; *Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139, 1149 [by failing to object to lack of notice at detention hearing that mother would have only six months to reunify with minor, mother forfeited argument on appeal]; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1152 [by failing to object to improper notice of the section 366.26 selection and implementation hearing, father forfeited argument on appeal].)

In the present case, Antonio first appeared and was appointed counsel on June 2, 2015. Prior to commencement of the section 366.26 hearing on August 28, 2015, Antonio appeared with counsel on July 1, July 10, July 14, and August 6, and counsel appeared without him on August 5. Antonio thus had ample time and opportunity to raise his due process concerns by way of a section 388 petition before the section 366.26 hearing. Indeed, at both the July 1 and July 14 hearings, when Isaac's counsel objected to Antonio's requests to continue the section 366.26 hearing (pending the results of the genetic testing), counsel expressly referenced Antonio's right to bring a section 388 petition.[17] The juvenile court also anticipated section 388 proceedings: At the July 14

---

17 On July 1, Isaac's counsel argued: "At this point, we have now had a[n] approximately three-month delay in . . . the [section 366].26 hearing, which initially was set for April, but has been continued several times for issues of paternity. At the very most, [Antonio] would be able to establish he's the biological father. However, in this case, that doesn't necessarily give great difference [*sic*] in terms of the [section 366].26 recommendations. He hasn't had a relationship with Isaac. *And at most, he would be able to maybe file a* [*section*] *338 . . . .*"

hearing when setting August 28 as the date for the section 366.26 hearing, the court set August 21 as the deadline for Antonio to file any motions, specifically mentioning the issue of reunification services.[18] The results of the genetic testing that confirmed Antonio's biological paternity were filed August 6, 2015 — more than two weeks before any motion was due. The arguments Antonio presents on appeal easily could have been presented to the juvenile court in the first instance. (See fn. 11, *ante*.)

Antonio claims that application of the forfeiture rule to him on this record would be "unfair" because he received no notice of the disposition hearing, and Crystal intentionally misled the juvenile court as to the identity of Isaac's biological father. We fail to see any unfairness, given that the record also establishes: Crystal and Antonio had sexual relations in May and June 2013; Crystal told Antonio of the pregnancy within the first three months of her pregnancy, perhaps as early as late June; at that time, Crystal also told Antonio that he was the father, and he said that he wanted a paternity test; and then *for two years, Antonio did nothing to find out whether he was the child's father, to help Crystal or the child, or to attempt to legally establish paternal rights*.[19] The record

---

On July 14, Isaac's counsel again argued: "So even if . . . [Antonio] is the biological [father], then what? *Then we're looking at a* [*section*] *388 for potential[] services* . . . ." (Italics added.)

18 Almost inviting a section 388 motion, the court stated that it did not have much information as to why Antonio had not come forward sooner.

19 We recognize that the evidence is conflicting as to some of these facts and that the trial court may have come to a different result if presented with the issue — in a section 388 petition, for instance. However, we are limited to stating the facts in the

further establishes that, once Antonio received notice of the proceedings, he took no affirmative steps that were not court-ordered, and even after genetic confirmation of paternity was established, he merely wrote two letters, completed a class and requested continuances of the selection and implementation hearing.

As a final argument, Antonio suggests that we should not apply the forfeiture doctrine, because "any section 388 petition would have been summarily denied." In support, Antonio argues only that "a section 388 request predicated on a prior notice error is not always a realistic remedy" where, as here, the section 366.26 hearing was already on calendar at the time counsel was appointed for him. However, neither section 388 nor any authority we have found allows a party like Antonio unilaterally to decide that *the established procedure* for raising his objections — namely, filing a section 388 petition in the trial court — will not provide "a realistic remedy" and to proceed directly to the appellate court. Antonio's proposed procedure is especially troublesome where, as here, some of the potentially outcome determinative facts were in dispute, and the credibility of witnesses is at issue. Although "application of the forfeiture rule is not automatic" (*S.B.*, *supra*, 32 Cal.4th at p. 1293), the exception to the rule is limited at best to situations where " 'the facts are not disputed,' " because in such situations " 'the effect or legal significance of those facts is a question of law' " (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1314). Here, Antonio does not present his due process issue as a question of law based on undisputed facts. To the contrary, Antonio is asking that we, in

---

manner most favorable to the order on appeal. (*Janee W.*, *supra*, 140 Cal.App.4th at p. 1448, fn. 1.)

the first instance, weigh disputed facts and decide both whether the Agency exercised reasonable diligence in searching for him, and whether Antonio was accorded due process given his knowledge of the situation and his actions. Our discretion to excuse forfeiture "should be exercised rarely and only in cases presenting an important legal issue" (*S.B.*, at p. 1293); this is not such a case.

B. *The Trial Court Did Not Err in Terminating Antonio's Parental Rights Once the Court Learned His Whereabouts, Even After Having Failed to Provide Him with Reunification Services*

Antonio argues that the juvenile court erred in terminating his parental rights once the court learned his whereabouts after the Agency failed to provide (or validly bypass) reunification services. We disagree with Antonio's analysis.

Antonio relies on *In re T.M.* (2009) 175 Cal.App.4th 1166 (*T.M.*), which in turn relies on two statutes: (1) section 361.5, subdivision (b)(1), which as we introduced at part I.A., *ante*, allows the juvenile court to bypass reunification services where the court is presented with proof that "a reasonably diligent search has failed to locate the parent" and finds by clear and convincing evidence that "the whereabouts of the parent . . . is unknown"; and (2) section 366.26, subdivision (c)(2)(A), which precludes the court from terminating parental rights if at any hearing at which the court was required to consider reasonable efforts or services, the court finds that reasonable efforts were not made or that reasonable services were not offered or provided.

At the disposition hearing in *T.M.*, the juvenile court first applied section 361.5, subdivision (b)(1) and, upon finding that the mother's whereabouts were unknown, bypassed reunification services without developing a case plan, and then set a six-month

review hearing.[20] (*T.M.*, *supra*, 175 Cal.App.4th at p. 1169.) Prior to the six-month review hearing, the agency located the mother in a locked psychiatric facility at which she was receiving various mental health services. (*Id.* at pp. 1169-1170.) At the review hearing, the mother's attorney explained that no plan had been developed because the residential facility was providing appropriate services, and the mother's conservator communicated that the mother could not meaningfully participate in agency-related unification services. (*Id.* at p. 1170.) The court confirmed that no services had been ordered, set a section 366.26 hearing, and at that hearing terminated the mother's parental rights over the objection of mother's counsel. (*T.M.*, at p. 1170.) The Court of Appeal reversed order terminating the mother's parental rights. Based on the finding at the six-month review hearing that no services had been previously ordered for the mother (because no services had been offered pursuant to § 361.5, subd. (b)(1)), section 366.26, subdivision (c)(2)(A) precluded the termination of the mother's parental rights. (*T.M.*, at pp. 1171, 1173.)

Relying on *T.M.*, Antonio argues that, because the juvenile court here originally denied reunification services to him based on "a finding that his whereabouts were unknown pursuant to section 361.5, subdivision (b)(1)" and because "Antonio's whereabouts became known to the [A]gency" approximately five months later, the court should have held a review hearing once section 361.5, subdivision (b)(1)'s bypass

---

20 Section 366, subdivision (a)(1) requires that the juvenile court conduct a status review hearing at least once every six months "from the date of the original dispositional hearing, until the hearing described in Section 366.26 is completed."

provision was no longer applicable; not having done so, Antonio's argument continues, section 366.26, subdivision (c)(2)(A) precluded the court from terminating Antonio's parental rights at the section 366.26 hearing.

We disagree for a number of reasons — each discussed in detail at part I.A., *ante*. First, by failing to raise this argument in the juvenile court, Antonio forfeited appellate review of the issue. (*S.B, supra*, 32 Cal.3d at p. 1293.) Second, contrary to the premise of Antonio's argument, the court neither found that Antonio's whereabouts were unknown nor bypassed reunification services pursuant to section 361.5, subdivision (b)(1); i.e., the court never considered services for Antonio (then called "Anthony . . . last name unknown"), because his identity — not his whereabouts — was unknown. Finally, since Antonio was not a presumed father, he was not entitled to receive reunification services under section 361.5 in any event. (*Id*., subd. (a); *Zacharia D., supra,* 6 Cal.4th at pp. 451, 453.)

For these reasons, the juvenile court did not err in terminating Antonio's parental rights once the court learned his whereabouts.

DISPOSITION

The juvenile court's August 28, 2015 order, inter alia terminating Antonio's parental rights, is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.